THE COMET.

Saturday, January 25, 1879.

SUPREME COURT DECISIONS.

MONDAY, *January* 20, 1879.

Reported Weekly by Jenkins & Little, Attorneys at Law.

BETTIE MOORE, vs. THOMAS F. CHRISTIAN. [No. 2900.]

Bettie Moore, the widowed mother of Frank Moore, a minor, sued out a writ of *Habeas Corpus* against defendant, to recover possession of her said son. Defendant answered that he exercised no restraint over said boy to detain him, and that he was at liberty to go if he chose.

The testimony shows that the father of the boy, before his death, put him in defendant's charge to keep until he attained majority, but without the knowledge or consent of the mother. It further shows that defendant refused to allow plaintiff to chastise the boy and compel him to return home, and that he desired to remain with defendant.

Held:

1. Nature gives to parents the right to the custody of their children, which the law recognizes and enforces and will never deny except it be shown that the parent is of bad character or from some other exceptional circumstances the parental custody is inimical to the best interests of the child.

2. A boy thirteen years of age will not be allowed to abandon his filial duties and select a home elsewhere more agreeable to his desires.

3. If the father in his lifetime, contracted with defendant, by which the latter should have charge of his son till he attained majority, it would not deprive the mother, after the father's death, of her right to his custody. Such a contract, if for valid consideration and binding on the father, would terminate at his death.

4. The fact that defendant refused to permit plaintiff to chastise the boy and compel obedience to her wishes and enforce a return home, is a withholding the custody of the child within the meaning of the statute. So would the mere harboring and employing a child contrary to the act of 1876 perhaps justify a writ of *Habeas Corpus*.

5. The case of *Maples vs. Maples*, 49 Miss., 393, in so far as it held that the conduct of the grandfather in refusing to permit the mother's agent to take possession of the child did not amount to a detention, is overruled.

Reversed and remanded with instructions to remand the child to the custody of the mother. Appellee to pay costs in both courts.

SAMUEL BILLINGSLEY, vs. T. J. NIBLETT, et al. [No. 2885.]

Appellees filed a bill in chancery to enjoin the sale of certain land, under a deed of trust made by T. J. Niblett and Nathan Niblett, to secure the payment of a promissory note given by them to Billingsley for the purchase of said land. The bill alleges that said Nibletts were at the time of the execution of said trust deed, and still are, married men, and that their wives did not execute the same. It further alleges that said complainants reside on the land, and that it is exempt by law as a homestead, and consequently the trust deed is void on account of the failure of the wives to join therein as required by the act of 1873.

Held:

1. The deed of trust was not invalid because the wives of the grantors did not join in its execution. It was made to secure the purchase money of the land.

2. The "homestead claim" is subordinate to the claim of the vendor for the purchase money of the land, and the fact that the vendor made a quit claim instead of a warranty deed, makes no difference.

3. The act of April 18th, 1873, does not vest in the wife of the exemptionist any interest in "his homestead," nor does it attempt to divest the husband's title to, or interest in "his homestead. It only requires the joinder of the wife in a conveyance thereof.

4. There can be no homestead rights as against the claim for the purchase money of the land on which the home is, because ownership is a condition precedent to the existence of a homestead.

Decree reversed and bill dismissed.

SALLY WILLIAMS, vs. SCHWAB & CO. No. 2603.

At the request of Mrs. Williams, a *feme covert*, Schwab & Co. paid off a debt due by her upon her store house, and the husband of Mrs. Williams being in debted to Schwab & Co., and desiring to obtain further credit, Mrs. Williams executed to them a deed to the store house absolute on its face but intended to operate as a mortgage to secure her and her husband's debts.

Mrs. Williams and her husband, after they had executed the deed, rented the store house and paid rent to Schwab & Co. After some litigation between the parties the conveyance was declared a mortgage and a foreclosure sale decreed. The matters were referred to a commissioner preceding the decree, who applied payments of rent to the husband's debts leaving the amount due by Mrs. W. wholly unpaid. From a decree rendered on this basis, the wife appeals, claiming that the payments should have been applied to her debt, because hers being a debt that bound the *corpus* of the property, while her husband's bound only the income, the former was the most onerous and payments should be applied most beneficially to the debtor.

Held:

It is a general rule that the application of payment shall be made, in the absence of a specific application by the parties, most benificially to the debtor. Of the general correctness of this rule there can be no doubt, but this case presents peculiar features. Two debts held by the same party were secured by the same mortgage, one of which bound the *corpus* the other the income only. Wher, therefore, rents came into the hands of the mortgagee he had a right to apply them to the husbands debts and if no application has been made, then the law will so apply them because that is the legal effect of the contract between the parties.

Affirmed.

EX PARTE, ISAIAH BELL. [No. 2886.]

On 13th April, 1877, appellant was convicted of assault and battery with intent to kill and sentenced to one year in the penitentiary from said date. Signifying his intention of prosecuting a writ of error to the Supreme Court, the Circuit Judge permitted him to be released upon a recognizance entered into in open Court.

The Supreme Court dismissed the cause from its docket because the appellant had not petitioned for or obtained a writ of error nor given bond as provided by law.

On the 15th January, 1878, Bell was rearrested and placed in jail where he remained until 18th April, when he was taken before the Chancellor for Chickasaw county, on writ of *Habeas Corpus*, asking to be released on the ground that the period fixed for his imprisonment in the penitentiary had expired. The application for a discharge from custody was denied, thereupon he prosecuted this appeal.

Held:

1. The relator was properly arrested by the sheriff after the case was stricken from the dockets here. Indeed, he ought never to have been discharged upon the recognizance taken in the Circuit Court. The only valid bond for appearance in this Court which a convict can give, is that provided in §2842, Code 1871, which must accompany the written petition for writ of error or appeal.

2. The appellant is by no means entitled to be discharged because the twelve months for which he was sentenced has expired. The date fixed for a sentence to commence is directory merely and forms no part of the sentence, and if from any cause it is not carried into effect the party should be brought before the Court and a new period prescribed. Such will be the duty of the Circuit Court of Chickasaw county in this case.

Affirmed.

G. W. REYNOLDS, Admr. vs. J. D. CROCKETT, use. etc. [No. 2923.]

Crockett, a mechanic, built a house for Mrs Baxter under a parol contract, for which he was not fully paid. Mrs. Baxter subsequently gave a deed of trust on the house which was not recorded. Crockett began suit to enforce his lien, not knowing that Mrs. Baxter had given a deed of trust on the property, within six months of the time when his contract became due. Pending the suit by Crockett the property was sold under the trust deed to Grierson who was admitted to defend the suit of Crockett.

Held:

By the institution of his suit Crockett acquired a lien superior to that of the unrecorded trust deed. Neither had a superior lien to the other until the institution of proceedings by the mechanic. He, by that event, became prior in time and superior in right, Code 1871, Sections 1603, 2304 and 2306.

Judgment affirmed.

MAYFIELD REESE vs. S. M. ROBERTSON, et al. [No. 2921.]

Gohlson & Hooper recovered judgment in Circuit Court against appellant, and transferred the same to Houston & Reynolds. Execution issued thereon and was placed into the hands of Osgood Taylor, Sheriff of the county. Appellant paid said Sheriff a sum of money supposed by the latter to be the whole amount demanded on said execution, and received from him a receipt in full. Clayton & Clayton, the attorneys of said Houston & Reynolds, demanded more of the Sheriff than the amount collected by the latter, and such additional sum demanded being due, Taylor paid it to said Clayton & Clayton, out of his own money, and received from them an assignment of said judgment. Taylor, afterwards, assigned the judgment to W. L. Clayton and others, sureties on his official bond. Execution was then issued on said judgment, placed into the hands of S. M. Robertson, then Sheriff of the county, and levied on certain lands of appellant, he having at the time sufficient personal property upon which to levy the same.

It is claimed by appellant that the payment by the Sheriff Taylor to said attorneys, Clayton & Clayton, of the full amount due on said judgment, operated as a satisfaction of the judgment, and that the assignment thereof to him, was void.

It is further claimed that the attorneys of the owners of the judgment had no authority to assign it, and that the assignment thereof by Taylor, was without consideration and therefore void; also that the second execution, and the levy thereof upon the lands of appellant, was void.

An injunction was prayed and obtained, but on motion was dissolved by the Chancellor. Hence this appeal.

Held:

1. It is always a question of intention whether a payment by one not a defendant in a judgment, shall operate as a satisfaction of it. The manifest purpose of the parties to the transaction here involved, was not to discharge but keep alive the judgment, as to the balance due by it, for the benefit of the sheriff who paid it, and took an assignment of it.

2. The assignment of the judgment was free from objection, if the attorneys had authority to assign it.

3. An attorney at law has no authority, as such, to transfer a judgment obtained by him for his client. His agency does not extend that far.

4. He who seeks to enforce a judgment by virtue of an assignment by an attorney at law, must show that the plaintiff in the judgment authorized or approved the transfer.

5. The levy of an execution on land when the defendant has sufficient personal property subject thereto, and well known to the Sheriff, is in violation of law.

Decree reversed and cause remanded.

JAMES A. DOGAN, Sheriff vs. T. J. N. BLOODWORTH. [No. 2935.]

Richardson & Co. leased land to Coopwood, who sub-leased part of it to defendant in error. R. & Co. to get their rent made affidavit for seizure as provided by Acts 1876, and had cotton and corn attached by the Sheriff. The writ issued by a Justice of Peace, failed to command the Sheriff to summon any one to answer. Coopwood voluntarily entered his appearance at the Circuit Court where the writ was made returnable.

Bloodworth brought replevin, and obtained the cotton. The trial of the replevin suit before the Justice Peace, resulted in judgment for the Sheriff. Bloodworth appealed to the Circuit Court, where judgment was reversed. At the trial in the Circuit Court Dogan, Sheriff, was not permitted to introduce as evidence the seizure proceedings, the Court holding the writ an absolute nullity. To which ruling Dogan took a special bill of exceptions, and assigns for error here, said ruling.

Held:

1. §712, Code 1871, provides that no process shall be held void because of the omission of any matter required to be inserted in or indorsed upon it, but that such process shall be amendable, and that such amendment may be made upon any motion to quash. The process in the case of Richardson & Co., vs. Coopwood, was amendable upon motion of Coopwood, to quash. He did not make the motion, but waived the defects and entered his appearance, though not until Bloodworth had sued out his writ of replevin. A stranger to a process can not treat it as void when the parties to it can not.

2. We are of opinion that Bloodworth could not, in this manner, assert claim to the cotton. By the 10th section of agricultural lien law, it is declared that all persons who have knowledge of the pendency of proceedings for the enforcement of the liens established by the act, shall intervene in such proceedings, and there propound any claim which they may have to the property in controversy, and it enacted in express terms if they failed to do so, they shall be bound by the judgments to be rendered.

The Legislature seems to have realized the evils and complications growing out of the adjudications by this Court that strangers claiming title to property which has been attached might take it out of the hands of the officers of the law by actions of replevin, and to have determined that a different rule should prevail in this new class of remedies.

3. It is suggested in the Court that the judgment of the Court below should be affirmed because the record does not show that plantiff in error either proved or offered to prove that any rent was due by Coopwood to his landlord, which it was necessary for him to do in order to justify the seizure. The case is here on a special bill of exceptions to the action of the Court in excluding evidence and it was only necessary to embody enough to show the error committed in such exclusion.

Judgment reversed and cause remanded, with instructions to enter judgement for defeodant below, with writ of inquiry to ascertain the value of the property and assess damages as in case of non suit, as provided by §1534, Code 1871.

2898—Wm. B. Sharpley vs. The State. Reversed.
2926—Weiler, Hass & Krouse vs. Board of Supervisors of Monroe county. Affirmed.
2927—B. McManus vs. Foster & Gardner. Affirmed.
2917—J. D. Tatum vs. Sarah L. McClellan. Reversed and remanded.
2908—Caruthers & Co. vs. Hill, Terry & Mitchell. Reversed and remanded.
2884—Geo. W. Jones and wife, vs Henry B. Sherman. Reversed and *venire de novo* awarded.
2791—State Board of Education vs. city of Aberdeen. Reversed and remanded.
2911—Z. D. Jennings vs. Joseph Lawshe. Motion to dismiss overruled.
2906—Fred Parchman vs. State of Mississippi. Affirmed.
2933—Southern Co-Operative Hotel Co. vs. Sarah L. Rice. Affirmed.

The Boy Who Doesn't Care.

"My son you are wasting your time playing with that kitten. You ought to be studying your lessons. You'll get a black mark if you do not study," said Mrs. Mason.

"I don't care," replied the boy.

"Don't care, will ruin that child," said Mrs. Mason to herself. "I will teach him a lesson he will not forget."

When noon arrived, her idle boy rushed into the house shouting:

"Mother, I want my dinner!"

"I don't care," replied Mrs. Mason.

James was puzzled. His mother had never so treated him before. He was silent awhile; then he spoke again:

"Mother, I want something to eat."

"Don't care," was the cool reply.

"But recess will be over, mother, and I shall starve if I don't get some dinner," urged James.

"I don't care."

This was too much for the poor boy to endure. He burst into tears. His mother said:

"My son, I want to make you feel the folly and sin of the habit you have of saying, 'I don't care.' Suppose I really did not care for you, what would you do for dinner, for clothing, for a nice home, for an education? I hope, therefore, you will cease saying, I don't care."

James had never looked on this evil habit in this light before. He promised to do better, and after receiving a piece of pie, went to school wiser if not better

Gretna Green.

Columbus Independent.

At dark Wednesday evening Mr. W. L. Taylor ond Mrs. Eliza Oats, of Lamar county, Ala., arrived in Columbus, at the warehouse, cold, wet and hungry. Their condition aroused the sympathy of the campers, and one said:

"I'll furnish the supper," and suiting his action to the expression, brought forth a basket filled with bread, bacon, potatoes, etc.

Another said:

"I'll feed the horses," and brought a sack of corn and fed their horses.

Another said:

"I'll fix a bed for the bride," and spread down some quilts on the floor. Next morning the proper papers were procured, and they were united as "man and wife" by Rev. W. C. Smith.

THE Hartford Times tells the story of a church organist who, in his voluntary on Thanksgiving morning, astonished the natives by incorporating "Baby Mine" with variations. After the service it was quietly reported that it was a bouncing girl, and "all doing well as could be expected."

Happy Thoughts.

Albany Argus.

He is a good man indeed who does all the good he talks of.

It is possible for a man to know his own mind and yet know very little.

It is perfectly safe to have some men owe you a grudge, for they never pay anything.

It does not follow that a blacksmith has no virtues because he is always to be found at his vice.

It's a good proverb which says that every man hath his cricket in his head and makes it sing as he pleases.

The vain man is, after all, the happiest. While the rest of us are trying to please others he is perfectly satisfied if he only pleases himself.

Standing by His Friend.

Yesterday morning some boys found a man lying in a snow drift on Chene street and so near frozen to death that he could not speak. There was a terrible odor of whisky about him, and beside him in the snow was an empty bottle. After half an hour's hard work the man was so far restored that he could speak, and his first words were:

"Doc—doctor, have I been froze?"

"Yes, and pretty badly," was the reply.

"Will I die, doctor?" continued the man.

"Well, there's a chance of it."

The patient made an effort to sit up, but fell back after a struggle and gasped out:

"Doctor, if I die I want it understood that the durned thermometer's killed me! Don't let them abuse whisky, doctor!"—Detroit Free Press.

A DRUNKARD was arrested in Chestnut street, Philadelphia, on Wednesday. He was bare-headed, and his clothing was torn. In the police station, when asked his name and residence, he said: "Maguffin, and I live on the Grampirn Hills, and I want to get soon, because I've got important busines." He was put into a cell, where he died of heart disease, brought on by dissipation. Then he was recognized as Mark Bates, the actor. Ten years ago he was regarded as one of the finest light commedians in this country, and was, most of the time, at the head of a traveling company; but latterly drunkenness unfitted him for acting. His last appearance on the stage in this city was at Niblo's Garden, last season. This winter he played in "Henry VIII" in Baltimore.—N. Y. Sun.

"The Lone Fisherman."

Gen. Butler, as "The lone fisherman from Massachusetts, or the bull-dozed man," figures on the front page of the Harper's Weekly. He is bobbing with a bait altogether too large and too poorly disguising the hook, to attract the coy Republican and Democratic gudgeons included in the pictures notwithstanding it is plainly labelled: "1880. The especial champion of human rights."